No. 18241

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID FARRELL and OLIVER J. FARRELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant United States Attorney,
Chief, Criminal Section,

EDWARD M. MEDVENE,
Special Assistant to the
United States Attorney,

J. BRIN SCHULMAN,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee,
United States of America.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 18241

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAVID FARRELL and OLIVER J. FARRELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

I.

Appellee's Statement of Facts Clearly and Accurately Documents Appellants' Scheme to Defraud.

Appellee submits that its Statement of Facts is an accurate and truthful summary of a complex criminal prosecution which lasted twenty-seven trial days, during which time more than 2,000 exhibits were introduced and over 4,000 pages of testimony was taken. The Statement, of necessity, was limited to the major points of appellants' scheme to defraud and could not and did not include all evidence introduced during the trial establishing appellants' misrepresentations and concealments in the creation, operation and offering of the Secured 10% Earnings Program to the investing public. Nor does the Statement give undue emphasis

to any particular aspect of the scheme to defraud such as appellant David Farrell attempts to do in his comments concerning "joint participation agreement" (Reply Brief, D. F. pp. 3-4).

Appellant David Farrell takes exception to the Statement of Facts, asserting that it "is a study in the use of hyperpole [sic], insinuation and omission." (Reply Brief, D. F. p. 1). However, despite appellant's blanket assertion, he is able to present only a few isolated instances in which the Statement of Facts is allegedly deficient. When closely examined, even these few meager examples show that appellee's Statement of Facts is completely supported by the record.

Appellant David Farrell claims that appellee's conclusion that $207,000 had been "misappropriated" in the Suisun Pierce Gardens transaction is not borne out by the record.[1] Actually appellee's Appendix A and Explanatory Note (9) establish that a portion of the $207,000 was in fact disbursed from the general funds of LATD&ME to William Bennett personally, and the remainder was disbursed to several of the numerous personal ventures entered into by David Farrell and William Bennett.[2]

In addition, David Farrell contends the record does not support appellee's ". . . characterization [in] . . . (Gov't. App. A, Item (X) (20)) that there was a joint venture agreement entered into by appellant in connection with the Palm Springs Alpine Estates transaction . . . ." Item X(20) does not in-

---

[1]Appellant David Farrell's Reply Brief, pp. 1-2, footnote 1.
[2]Appellee's Brief, Appendix A, Item (L) (18).

dicate that David Farrell entered into a joint venture agreement relating to Palm Springs Alpine Estates, but rather that there were "Participations by David Farrell" in conjunction with that transaction.

In this situation, David Farrell personally acquired 320 acres,[3] which acreage was a portion of the larger property acquired by the developer from the original owner. This 320 acres was one-half of Section 25, which was one of the two most valuable sections in the area [R. T. 2316-2317], and it was not encumbered by any of the 653 trust deeds "purchased" by LATD&ME. Those trust deeds covered other property known as Palm Springs Alpine Estates [GX. 394].

Appellant asserts the government took "only a trainee appraiser's report" relating to the Capitol Park Estates tract in Sacramento, California as representative of the value of that property. This appraisal, so strongly objected to, was made by a member of LATD&ME's so-called appraisal department and was offered into evidence by appellant David Farrell [R. T. 3863]. On cross-examination, David Farrell admitted knowing the land had been valued at $666 per lot [R. T.

---

[3]Under the terms of an Agreement dated April 18, 1960 between Lincoln Mining Corporation (David Farrell's corporation [R. T. 3939]) and Palm Springs Alpine Estates, Lincoln Mining Corporation transferred 10,000 shares of Southern California Land and Development Corporation stock, which stock had no material value [R. T. 3938], to Palm Springs Alpine Estates in exchange for a grant deed to the fee title to the "western one-half of Sec. 25, T. 5 South, R. 4 East, San Bernardino Base and Meridian, County of Riverside." This 320 acres was taken free and clear by Lincoln Mining Corporation and the Agreement specifically stated that "this conveyance . . . is not made for creating a trust or security deposit, nor an agency relationship with respect to either the land or the shares of stock conveyed." [GX. 400, 401.]

4134][4] but claimed the trust deeds were valued on what the "finished" value of the lot would be. Farrell realized it would cost between $1,300 to $1,700 to "finish" each lot, or that a total of well over a million dollars would be necessary to improve the 1,451 lots upon which trust deeds had been placed. Regardless of this fact Farrell testified that no money had been set aside for the improvement of the land [R. T. 4138-4139].

Appellant notes that William Bennett testified that the Capitol Park Estates land had been appraised by another appraiser at $4,000 per acre as raw land without utilities. Against 355 acres of this property 1,451 trust deeds were created, each having a face value of $1,350. Even utilizing the $4,000 per acre raw land estimate, it is readily seen that LATD&ME allowed each acre of land to be encumbered with at least $5,400 of trust deeds.[5]

Appellant David Farrell[6] also criticizes that portion of appellee's Statement of Facts[7] relating to the appraisal on the Villa Nipomo tract. Appellant refers to "the extensive evidence by Mr. Farrell," establishing the lots were to be developed as trailer sites. This "extensive evidence" amounted to one paragraph of David Farrell's direct examination where he stated the trailer sites "would have a value somewhere between twenty-

---

[4]This amount was set out in Appellant's own appraisal report, Exhibit DF-AY, as the value for each "tentative lot" to be developed.

[5]Bennett testified this property could be divided into 4 to 4½ lots per acre [R. T. 1371].

[6]Reply Brief DF, p. 2, footnote 2(b).

[7]Appellee's Brief, pp. 34-36.

four hundred dollars and twenty-eight hundred dollars *upon completion* . . ." [Emphasis added; R. T. 4231]. Even if this were true, the "independent" appraisal offered into evidence by appellant David Farrell, supports the government's position that the trust deeds were tremendously overvalued when compared with either the raw land value of the property *or* the projected value, if and when it was developed.[8]

Appellant David Farrell claims his intent in entering into the joint venture transactions or participation agreements was "(1) to protect the company and its customers and (2) to defer income to . . . Appellant. . . ." Aside from the fact that David Farrell's objectivity was somewhat questionable when he entered into the numerous land transactions for LATD&ME, only advancing LATD&ME monies when and if he, in a personal capacity, took a share of the profits, it should also be noted that in several of the joint venture agreements no "protection" was afforded anyone other than the developer or David Farrell.[9]

---

[8]Appellee's Brief, pp. 35-36.

[9]E.g., GX 148, a joint venture agreement, dated September 18, 1958, between George C. Goheen and David Farrell, which provides in part: . . .

> "WHEREAS, the parties to this agreement desire to combine their efforts and joint venture the development of subject property (i.e., Scott Highlands, located in Mill Valley, Marin County, California) for residential properties,
>
> "NOW THEREFORE, the parties do mutually agree from and after the instant date to joint venture the development and sale of the properties . . . upon the following conditions. . . .
>
> "Article VI:
>
> "Profits: Losses: The parties shall share equally in the profits and in the losses of the venture. . . .
>
> "Net profits shall be distributed to the members of the venture, annually, or at such other times as the parties may from time to time mutually agree."

Even in those agreements where Farrell claimed there was built-in protection for the customers of LATD&ME, the investors had no knowledge thereof, and these agreements could be changed at David Farrell's will (see, *e.g.,* the transaction with William Bennett where despite the "agreement" that the proceeds from the sale of the various Westgate lots would go first to retire the encumbrance on the Suisun Pierce Gardens property, David Farrell would not permit the lots to be released and the funds to be disbursed unless he personally received 50% of the profits [R. T. 1216, 1248-1250]).

II.

There Was No "Plain Error" in the Record and Appellants' Rights Were Protected at All Stages of the Proceedings.

As detailed in the Statement of Facts in appellee's opening brief, this was not a case where the evidence was "finely balanced." The overwhelming and massive weight of the evidence, consisting in large part of LATD&ME's own internal records, showed a plan and course of operation, designed by appellants, which succeeded in parting Secured 10% Earnings investors from millions of dollars of their hard earned funds. The investors were "secured" in the most part by greatly overvalued parcels of earth and the unfulfilled promises of the Farrells—the scheme's architects.

The Court in weighing the significance of any error alleged by appellants to be found in the 4,500 page transcript,

> ". . . must take account of what the error meant . . . *not singled out and standing alone, but in relation to all else that happened* . . .

> If . . . the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. . . . (emphasis added).
>
> *Kotteakos v. United States,* 328 U. S. 750, 764 (1946).

Certainly a criminal appeal should not be turned into a quest for error. *Bihn v. United States,* 328 U. S. 633, 638 (1946).

As this Court said in *Gilbert v. United States,* 307 F. 2d 322, 326-327 (9th Cir. 1962), a verdict should be overturned only when the alleged error ". . . would result in a manifest miscarriage of justice, or would 'seriously affect the fairness, integrity, or public reputation of judicial proceedings' . . ." Certainly in the case at bar there is no ". . . plain error . . . affecting the substantial rights of the appellants, nor . . . any error which would result in a manifest miscarriage of justice . . ."

The cases cited by appellant David Farrell, in his reply brief, are clearly distinguishable from the case at bar in that the "error" alleged in those cases was found to affect the "substantial rights" of the defendants. In *Bihn v. United States,* 328 U. S. 633 (1946), the crucial issue was whether petitioner stole certain ration coupons from the bank. Petitioner did not take the stand, there was no direct evidence that petitioner stole the coupons, and there was a conflict in testimony presenting a question of credibility for the jury. Against this background the judge charged the jury ". . . Did she steal them? Who did if she didn't? You are to decide that." The appellate court, in reversing peti-

tioner's conviction, said that prejudicial error was committed since petitioner was not afforded the protection of the "presumption of innocence", as the trial court had instructed the jury that to justify acquittal it was the jury's duty ". . . (a) to decide that appellant committed the theft unless (b) they decided that some other person did . . .".

In *Bollenbach v. United States,* 326 U. S. 607 (1946), the jury, after deliberation, returned to the courtroom "hopelessly deadlocked." Then, in response to the jury's question regarding a "vital issue" in the case, the court's comments were found by the appellate court to be ". . . not even 'cursorily' accurate. He [the court] was simply wrong." In addition the jury after a "plain hint" from the court that a verdict should be forthcoming returned with a guilty verdict within five minutes.

In *Mora v. United States,* 190 F. 2d 749 (5th Cir. 1951) there was no substantial evidence against appellant apart from the confessions of his co-defendants. This testimony was improperly admitted against appellant without limiting instructions, since the confessions had been made after the alleged conspiracy concluded and in appellant's absence. Belatedly the court instructed the jury to disregard the confessions. It was only under these limited circumstances that the appellate court reversed the conviction holding there was no assurance that the jury had not been substantially swayed by the use of the confessions.

In *Little v. United States,* 73 F. 2d 861 (10th Cir. 1934), the judge permitted the court stenographer to attend in the jury room, outside the presence of de-

fendant or his counsel and to re-read the court's instructions. This procedure was found to violate the basic proposition ". . . that no one should be with a jury while it is engaged in its deliberations . . ." The court concluded by saying ". . . without exception, as far as we are advised, such procedure has been held to be error. . . ." This departure from well accepted principles, is a far cry from the situation presented by appellants in the instant case.

Nor was the error in *Braswell v. United States,* 200 F. 2d 597 (5th Cir. 1952) of a type remotely related to the facts before this court. In *Braswell,* numerous defendants were on trial for offenses involving the acquisition and transfer of marihuana. During the trial, and in open court in front of the jury, one of the defendants assaulted a United States Marshal, and received an assist from one of the other defendants. They were both subdued, and removed from the courtroom. Another defendant, also in the presence of the jury, attempted to swallow two yellow capsules and bit the finger of the policeman who extracted them from her mouth. The court refused to discharge the jury, after either occasion, and gratuitously commented to the jury that the assaulting defendant's actions were possibly due to his being under the influence of marihuana. The appellate court found that all of the defendants were prejudiced by the physical and violent scenes, involving only three of the defendants, as well as by the court's remarks, inasmuch as all had been arrested in the same raid on a cabin which was allegedly the scene of a marihuana party. The court also found, under these circumstances, that the trial court's comments were

bound to be highly prejudicial and to affect the substantial rights of the defendants.

Appellants' citations of *Hayes v. United States,* 112 F. 2d 676 (10th Cir. 1940) and *United States v. Grady,* 185 F. 2d 273 (7th Cir. 1950) add no new factual or legal principles. The *Hayes* case does no more than point out the general rule that ". . . alleged errors taking place during the trial of a criminal case must be called to the attention of the trial court, thus affording an opportunity for correction . . .". The court noted that nevertheless ". . . an appellate court may correct serious errors involving life or liberty of the accused, although not preserved by proper objection . . .", but refrained from doing so holding:

> ". . . a careful examination of the record convinces us that the asserted error falls far short of coming within the exception to the general rule."

In *Grady, supra,* a sworn affidavit attached to the Information, saying that all of ". . . the facts stated in the foregoing Criminal Information are true" was permitted to go to the jury. The affiant was not a witness in the case, nor had there been an opportunity to cross-examine him on the contents of his affidavit. Further, the court did not refer to the affidavit in its instructions or otherwise. There was no reason to believe that the defendant even knew the affidavit would be going to the jury. In this context, the court found that the affidavit might well have persuaded the jury to convict and held ". . . the submission of the affidavit to the jury was erroneous, [and] that it might have been harmful to the defendant and was. therefore, prejudicial . . .".

III.

The Trial Court Did Not Commit Error in Giving a Summary of the Previous Civil Litigation Between the Securities and Exchange Commission and the Los Angeles Trust Deed & Mortgage Exchange.

The court's ruling in *United States v. Satuloff Bros.*, 79 F. 2d 846 (2nd Cir. 1935), cited by appellant[10] is consistent with appellee's position before this court. In that case the court refused to permit appellants to introduce a civil judgment into evidence as conclusive proof of the decisive issue in the criminal case—who stole certain property. In the instant case, the court's summary of the prior proceedings was given only to indicate that charges had been made against LATD&ME, not that they were true.[11]

As appellee pointed out in its opening brief,[12] an LATD&ME investor, prior to depositing his money with the company, was entitled to have knowledge that LATD&ME had been charged with fraud and insolvency regardless of the truth or falsity of these allegations, so that he might make suitable inquiry before entrusting his savings with LATD&ME.

---

[10]Reply Brief, DF, p. 9.

[11]See Appellee's Brief, p. 73, footnote 51 for court's summary of proceedings.

[12]Appellee's Brief, pp. 72-75.

IV.

The Court's Ruling Regarding Investor Losses Was Proper and Did Not Prejudice Appellants.

Appellant David Farrell asks "If Appellee had evidence that a particular trust deed was not as represented or that a particular customer suffered loss prior to the 'run' on LATD or the take over by the Receiver, why didn't it produce its witnesses, ask the questions and have done with it." (Reply Brief, DF, p. 10). This is exactly what the government did. The evidence is without contradiction that LATD&ME's brochures and other sales literature and the presentations made by its salesmen unequivocally conveyed the message that the trust deeds introduced by LATD&ME into the accounts of investors were prime, trouble free and well seasoned, with the property owner normally maintaining at least a 15% cash equity in the property [R. T. 1041; 1529-1531; 1925-1926; 2188-2189; 2259; GX 842; 843; 844; 992(b); 1668; 1669]. Investors were likewise informed that it was LATD&ME's policy to replace defaulted or delinquent trust deeds with trust deeds in good standing.[13] The government proved the falsity of these representations by calling witnesses and introducing evidence to establish that prior to receivership 2,717 trust deeds in investor's accounts, totaling $8,-500,000, were delinquent [R. T. 2779-2780; 2809-2811; GX 6001(c); Appendix L]; that delinquent trust deeds were introduced into the accounts of investors [GX 764; 1186]; that LATD&ME's confirmations failed to fully describe prior liens and contained spurious in-

[13]See Appellee's Brief, pp. 51-52.

formation regarding the underlying trust deed security [R. T. 1462-1463, 1484-1493; 1557-1558, 1565-1566, 1575-1577; GX 788; 796; 867(a); 869(a)]; and that LATD&ME's salesmen misrepresented the nature and quality of the underlying trust deed security [R. T. 1565-1566, 1578-1579]. The government likewise established that LATD&ME introduced many thousands of grossly overvalued[14] trust deeds into the accounts of investors, manufactured against raw land in which the developer had no equity [see *e.g.,* R. T. 1266, 1271, 1278, 1299; 1635; 2102-2103].

Thus, it is clear that the testimony by investors as to losses was merely cumulative of the mass of other evidence establishing lack of value of the trust deeds selected for the Secured 10% Earnings Program.

V.

Exhibit 6003 Was Properly Admitted in Evidence.

Appellant David Farrell, while noting that his attorney Mr. Dunn "had no knowledge of the true contents of Exhibit 6003 until the jury came in for further instructions on April 16, 1962," glosses over his own admitted familiarity with Exhibit 6003 as illustrated in appellee's opening brief[15] (Reply Brief, DF p. 14). Nor was his attorney without awareness of the possible importance of the exhibit, as illustrated by Attorney Dunn's comment when counsel for appellee and the court advised him the exhibit was available for inspec-

---

[14]See Appellee's Brief, pp. 29-38.

[15]Appellee's Brief, p. 90, footnote 67.

tion, approximately three weeks prior to the end of the trial.[16]

Appellee's opening brief[17] clearly points out that appellants are in error when they assert the government was ordered to excise extraneous and immaterial matter from Exhibit 6003. The transcript also makes it abundantly clear, that government counsel did not mislead appellants nor discourage them from a thorough examination of the exhibit.[18]

As the court said in *Finnegan v. United States,* 204 F. 2d 105 (8th Cir. 1953), *certiorari denied,* 346 U. S. 821, where certain documents not admitted into evidence.[19] went to the jury,

> ". . . Defendants counsel had notice that it was the purpose of the court to send all exhibits to the jury and no objections were made. There was no showing that the jury in fact examined these exhibits and there is no evidence indicating that defendant was prejudiced by their having been placed in the hands of the jury."

The judgment was affirmed in *Finnegan* and it is submitted that the situation in the instant case demands no less.

---

[16]Appellee's Brief, p. 100, footnote 75.
[17]Appellee's Brief, p. 86, footnote 60.
[18]Appellee's Brief, pp. 99-101.
[19]See Appellee's Opening Brief, pp. 95-96.

Conclusion.

For the reasons stated herein and in the opening Appellee's Brief, it is respectfully submitted that the judgments as to both appellants should be affirmed.

Respectfully submitted,

FRANCIS C. WHELAN,
United States Attorney,

THOMAS R. SHERIDAN,
Assistant United States Attorney, Chief, Criminal Section,

EDWARD M. MEDVENE,
Special Assistant to the United States Attorney,

J. BRIN SCHULMAN,
Assistant United States Attorney,

Attorneys for Appellee, United States of America.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Brin Schulman,
Assistant United States Attorney.